No. 235

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 235

UNITED STATES OF AMERICA, PETITIONER

v.

STANDARD OIL COMPANY OF CALIFORNIA AND IRA BOONE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 14, 1946.

OPINIONS BELOW

The opinion of the District Court of the United States for the Southern District of California (R. 10–25) is reported at 60 F. Supp. 807. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 41–48) is reported at 153 F. 2d 958.

JURISDICTION

The judgment of the court below was entered on February 14, 1946. (R. 48). A petition for rehearing, filed by the United States, was denied on March 29, 1946 (R. 49). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States may recover from third-party tortfeasors the salary paid to, and the hospital expenses incurred in treating, members of its armed forces during the period their services are lost to the Government due to the negligence of such tortfeasors.

2. Whether the right to such recoveries is to be determined by state or federal law.

STATUTE INVOLVED

Section 49 of the California Civil Code, as amended, provides as follows:

> § 49. *Abduction, Seduction, Injury to Servant.*—The rights of personal relations forbid:
>
> (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody;
>
> (b) The seduction of a person under the age of legal consent;
>
> (c) Any injury to a servant which affects his ability to serve his master, other than seduction, abduction or criminal conversation.

STATEMENT

On January 23, 1945, the United States filed a complaint in the United States District Court for the Southern District of California, Central Division (R. 2–4), to recover the salary paid, and the reasonable value of the hospital care furnished, by the United States to John Etzel, a private in the Army of the United States, during the period of his incapacitation due to injuries he suffered on February 7, 1944, as a result of the allegedly negligent operation by respondent Boone of a truck owned by respondent Standard Oil Company of California. The complaint sought judgment in the amount of $192.56, consisting of $123.25 for hospital care and $69.31 for salary paid during the period Etzel's services were lost to the Government (R. 4).[1]

Respondent's answer (R. 5–7) denied that Etzel was the servant of the United States; denied that Boone was an agent of the respondent Standard Oil Company; denied that Etzel had been injured as the result of respondents' negligence; and affirmatively pleaded that the complaint failed to state a claim upon which relief could be granted; that Etzel was contributorily negligent; and that Etzel, on March 16, 1944, had executed a general release, discharging respondents from liability for the accident.

[1] It was later stipulated between the parties that $123.25 in fact represented "the fair and reasonable value of hospital care necessarily required for John Etzel * * *" (R. 8).

Following a trial without jury, the district court entered findings of fact, conclusions of law (R. 27–31), and a judgment awarding damages in the amount sought by the United States (R. 32–33). In its opinion (R. 10–25) and findings, the court held that Etzel's injuries and the consequent loss of his services as a soldier to the Government had been caused solely by respondents' negligence; that in such circumstances the Government was entitled to recover in the amount and for the items of damage alleged; and that Etzel's release was ineffective to discharge respondents' independent liability to the Government for the salary it paid Etzel and for the hospital expenses it incurred in treating him.

On appeal (R. 33) the court below reversed (R. 40–48), holding that the existence of a right of action in the Government for the items of damage alleged was a question to be determined by reference to California law, and that the Government-soldier status was not one protected by Section 49 of the California Civil Code since it did not fall within the "master-servant" category contained therein. Finally, the court held that the general release executed by Etzel barred the United States from asserting any right of subrogation or indemnification against the respondents for the hospital expenses incurred or salary paid Etzel.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the United States may not recover from a tortfeasor the hospital expenses incurred in treating, and the salary paid to, a member of the armed forces during the period of his incapacitation due to injuries inflicted upon him by the tortfeasor.

2. In holding that the existence of such right of recovery is a question to be determined by state rather than federal law.

3. In failing to hold that under federal law such right of recovery exists.

4. In holding that a release given the tortfeasor by the injured soldier bars the United States from asserting its independent right of recovery based on loss of the soldier's services.

5. In reversing the judgment of the district court.

REASONS FOR GRANTING THE WRIT

In the present case, and in the numerous similar instances where the United States have been deprived of the services of Army personnel because injured by the negligent actions of third persons, the Government has, under the pertinent statutes and Army regulations, provided hospitalization and medical care and paid their salaries during the period of their incapacitation.[2] Whether in

[2] *With respect to hospital care:* Under the broad authority of the Secretary of War to issue regulations for the

such circumstances the United States may recover from the tortfeasor the salary so paid, and the reasonable value of the hospital and medical care so furnished, is a question of first impression in this country. It is a question of importance, which, we submit, should be decided by this Court. Upwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, and the payment of compensation during incapacitation, have been reported by the War Department

---

hospitalization and medical care of all military personnel (see the Act of July 15, 1939, c. 282, 53 Stat. 1042, 10 U. S. C. 455e), medical attendance was authorized for all enlisted men at the time here in question. Par. 2b (1), Army Regulations 40–505, September 1, 1942. Substantially similar provisions were contained in Army Regulations 40–505, December 5, 1945, as changed by Changes No. 1, February 28, 1946, now in force. Under Section 3 (d) of the Selective Training and Service Act of 1940, 54 Stat. 885, 886, 50 U. S. C. App. 303 (d), inducted personnel are entitled to all benefits accorded other enlisted men.

With respect to pay during incapacitation: Pay otherwise authorized (by the Pay Readjustment Act of 1942 as amended, 56 Stat. 359, 1037, 37 U. S. C., Supp. IV, 101 *et seq.*) may only be withheld, in the absence of court-martial or certain board proceedings, during unauthorized absence from duty in excess of twenty-four hours (Par. 3a, Army Regulations 35–1420, December 15, 1939), or because of the effects of a disease attributable to the intemperate use of alcoholics or habit-forming drugs. Sec. 1 of the Act of May 17, 1926, 44 Stat. 557, 10 U. S. C. 847a; Army Regulations 35–1440, November 17, 1944. As Etzel's absence from duty was not occasioned by any of the above causes, the Army was legally bound to compensate, and did compensate, Etzel for the period he was hospitalized.

to the Department of Justice in the past three years. Additional instances are presently being reported to the War Department at a rate approximating 40 a month. The suit at bar is representative of a number of actions already commenced by the United States against the third-party tortfeasors.[3]

1. The right of the Government to recover damages of the nature sought here is grounded on well-settled common-law principles of legal liability. *Attorney General* v. *Vallee-Jones*, [1935] 2 K. B. 209. There the Crown was awarded damages for the loss of services of two aircraftsmen of the Royal Air Force tortiously injured by the act of a third party, on the strength of the common-law action for loss of services of a servant, the familiar trespass *per quod servitium amisit*; and it was held that the value of the hospitalization furnished and the wages paid the men while they were incapacitated constituted an appropriate measure of dam-

[3] In *United States* v. *Atlantic Coast Line R. Co.*, 64 F. Supp. 289, the District Court for the Eastern District of North Carolina dismissed an action to recover for the interim loss of services of a soldier who died shortly after being injured, on the ground that no master-servant relationship existed between the Government and the soldier. In *United States* v. *Klein*, 153 F. 2d 55 (C. C. A. 8), an action to recover the wages and medical treatment furnished an injured Civilian Conservation Corps enrollee was dismissed on the ground that the United States Employees' Compensation Act provided the United States a method of recoupment—a method not here available.

ages. In *Commonwealth* v. *Quince*, 68 Comm. L. R. 227, [1944] Argus L. Rep. 50, the High Court of Australia split sharply on the same issues; three of the judges held that the action could not be maintained because the Government-soldier status differed from the modern master-servant relationship, while the other two held that the action was well founded.[1]

But examination of the origins and subsequent development of the action of trespass *per quod servitium amisit* negatives the notion that the sovereign-soldier relationship here sought to be protected must be grounded on contract simply because that is the present basis of the master and servant relationship.

The right of a master to recover damages from a third-party tortfeasor whose acts have caused the loss of his retainer's service is one of the oldest known to the common law. Bracton, *f.115; Britton (Nichols' tr., 1901 ed.) 109. The action of trespass *per quod servitium amisit* originated at a time when the relationship was one of status, not founded upon a contract of employment. *Admiralty Commissioners* v. *S. S. Amerika*, [1917] A. C. 38, 44–45; 8 Holdsworth,

[1] Although holding that the action was not maintainable, one of the three majority judges joined the minority in holding that a recovery of hospital expenses and wages would be proper, assuming the relationship was one protected at common law. See 68 Comm. L. R. at 247.

History of English Law (2d ed. 1937) 429.[5] Nor has the absence of a contractual basis for the relationship prevented the application of the doctrine in cognate fields. The master-apprentice relationship, traditionally protected (*Ames* v. *Union Ry.*, 117 Mass. 541; *Hodsoll* v. *Stallebrass*, 11 A. & E. 301; see *Bradford Corp.* v. *Webster*, [1920] 2 K. B. 135), often originated as the result of statutory provisions without the consent of the apprentice (*e. g.*, *Johnson* v. *Dodd*, 56 N. Y. 76), and could not readily be terminated prior to the expiration of the indenture period. A *de facto* relationship of service is sufficient to establish a right of recovery *per quod servitium amisit*, by the father of an adult daughter remaining in his household for loss of services occasioned by injuries consequent upon her seduction. *E. g.*, *Beetham* v. *James*, [1937] K. B. 527. The gist of all such actions is the "master's" loss of services.[6]

[5] As stated by Latham, C. J., in *Commonwealth* v. *Quince*, 68 Comm. L. R. at 237: "The relation between the lord of the manor and his villeins * * * did not depend upon any contract * * *. The rights depended upon rules of law. Accordingly, the remedy of the master for loss of services of a villein was not in its origin associated with any contract of service."

[6] The two cases rejecting this doctrine (*Chelsea Moving Co.* v. *Ross Towboating Co.*, 280 Mass. 292; *Philadelphia* v. *Philadelphia R. T. Co.*, 337 Pa. 1) are out of line with the overwhelming weight of authority (see 18 Cornell L. Q. 292) and were moreover rested upon peculiar state doctrines that to permit an independent recovery by a master would result in the splitting of a cause of action.

And it is upon this precise allegation and proof of loss of services that a father recovers for the loss of services of a child injured by the tortious act of a third person. *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Whitney* v. *Hitchcock*, 4 Denio (N. Y.) 461; *Berringer* v. *Great Eastern Rwy. Co.*, 4 C. P. Div. 163.

It is submitted that the instant case presents precisely those elements which historically gave rise to, and which have continued to vitalize, the doctrine that a parent, husband, or master may recover for the loss of services of his child, wife, apprentice or servant. Certainly if the status of the Government *vis-a-vis* members of its armed forces is not precisely one *in loco parentis*,[1] it is clear that its right to their services is as absolute, if not more so, than was the master's at the time the doctrine took shape. It would seem plainly anomalous to hold that because the formation and continuation of a modern master-servant relationship is more consensual than formerly, protection will not be afforded a relationship clearly

---

[1] Enlistment in the Army emancipates a minor from the control of his father. *United States* v. *Williams*, 302 U. S. 46, 49, note 8, and cases there cited; *King* v. *Inhabitants of Rothcefield Greys*, 1 B. & C. 345; see Williams J., in *Commonwealth* v. *Quince*, 68 Comm. L. R. 227, 256. Similarly, enlistment emancipates an apprentice from the control of his master. *Johnson* v. *Dodd*, 56 N. Y. 76. And the control of the sovereign over the soldier has been compared to that of the master over an apprentice. *King* v. *Inhabitants of Norton*, 9 East 206, 210.

approximating statuses historically covered. Cf. *Seas Shipping Co., Inc.*, v. *Sieracki*, No. 365, Oct. T. 1945, decided April 22, 1946; *Commonwealth* v. *Quince, supra*, 68 Comm. L. R. at 235–239, 253–257. Moreover, in its essential elements—the right of selection, control over detail of performance, dismissal, and the duty to pay wages—the Government-soldier relationship is that of master and servant. And if a contract of service be deemed essential, enlistment in the armed services of the United States is contractual (*In re Grimley*, 137 U. S. 147, 151; *In re Morrissey*, 137 U. S. 157, 159; *United States* v. *Williams*, 302 U. S. 46, 49), and since "the status of a citizen properly drafted and that of one who has voluntarily enlisted are the same" (*Selective Draft Law Cases*, 245 U. S. 366, 371), a contract implied in law may be taken as existing between the United States and one inducted. It is submitted that the features adverted to by the court below as distinguishing the Government-soldier status from the ordinary master-servant relationship are not relevant to the point here at issue. For, as we have pointed out above, the gist of an action of trespass *per quod servitium amisit* is the right to and the loss of services.

In view of the foregoing, it is submitted that the release given respondents by Etzel cannot operate to defeat the action. The injury to the servant and to the master are collateral to and not consequent upon each other. The servant

cannot waive the damages of the master, nor is recovery by a servant any bar to a subsequent suit by the master. *Callaghan* v. *Lake Hopatcong Ice Co.*, 69 N. J. L. 100; *Louisville & N. R. R. Co.* v. *Willis*, 83 Ky. 57; *Whitney* v. *Hitchcock*, 4 Denio (N. Y.) 461; *Franklin* v. *Butcher*, 144 Mo. App. 660; *Berringer* v. *Great Eastern Rwy. Co.*, 4 C. P. Div. 163; *Hornketh* v. *Barr*, 8 Serg. & R. (Pa.) 36; *Robert Marys's case*, 9 Coke 111 B; *Commonwealth* v. *Quince*, *supra*; cf. *Lansburgh & Bro.* v. *Clark*, 127 F. 2d 331, 333 (App. D. C.); see Smith, *Master and Servant* (8th ed.) 108. It is to be noted that the aircraftsmen in respect of whose loss of services damages were awarded to the Crown in the *Vallee-Jones* case, *supra*, had theretofore recovered damages for the injury itself from the tortfeasor. [1935] 2 K. B. at 210, 215.

It is thus not a ground for objection that under the "prevailing American doctrine" (R. 47) an injured party may recover from the tortfeasor for wages lost and medical expenses incurred even where these amounts have been furnished him gratuitously, or as a result of insurance. None of the cases cited by the court below as so holding involves an action based upon the independent right to recover for the loss of services of the party injured. In such cases, damages are at large, and the master may recover both for appropriate expenditures for hospital and medical

care and for wages which are paid during the period of incapacitation by reason of the defendant's negligence. 2 Cooley, *Torts* (4th ed.) § 180; *Attorney General* v. *Vallee-Jones, supra; Smaill* v. *Alexander,* 23 N. Z. L. R. 745; *Dixon* v. *Bell,* 1 Stark. 287; see Reeve, *Domestic Relations* (4th ed. 1888) 487; *Hodsoll* v. *Stallebrass,* 11 A. & E. 301; *Woodward* v. *Washburn,* 3 Denio (N. Y.) 369, 371.[8]

2. We submit that the holding of the court below that the United States' right to recovery in the instant circumstances must be determined by reference to Section 49 of the California Civil Code constitutes error, and is in conflict with principles repeatedly enunciated by this Court. *United States* v. *Allegheny County,* 322 U. S. 174; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *Board of Commissioners* v. *United States,*

[8] Moreover, it may be independently noted that the prevailing rule has been primarily established in cases where the defense has been raised against the injured party in instances where the person supplying his wages and hospital expenses did so gratuitously, or under a contract of insurance; that the rule has not been universally adopted; and that in other states the issue of whether the payments are in fact gratuitous will govern the result. See the cases collected in 18 A. L. R. 678–683 and 98 A. L. R. 575–579; and compare *Illinois Central R. Co.* v. *Porter,* 117 Tenn. 13, 31–32 (tortfeasor not entitled to deduct from ordinarily consequential damages salary actually paid injured postal clerk because, under postal laws, payment during illness was a matter for discretion of postal officials and hence could be considered a gratuity).

308 U. S. 343; *cf. D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447; *Deitrick* v. *Greaney*, 309 U. S. 190. As noted by the court below, the California Code affords a right of action against the third-party tortfeasor where the relationship is one of master and servant. Nothing, however, more graphically underlines the error of the court below than its holding that it was the "intent" of the state legislature in enacting Section 49 to preclude the Government-soldier status from protection. Since that status exists only in the Federal domain, it would seem clear that the state legislature did not enact Section 49 with the intent of either including or excluding that relationship from the protection therein extended.

It is, moreover, plain that if, as we believe, the nature of the relationship is such that recovery may be had, a state legislature could not abridge such a right. As this Court stated with respect to Government war procurement contracts, "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *Allegheny County*, 322 U. S. 174, 183. The nature of the relationship between the Government and soldier, and the rights arising in the Government there-

from, are equally immune from State control. In short, had it been authoritatively determined that the United States had a cause of action against one who tortiously injured one of its soldiers, prior to the passage of the California Code, no subsequent act of the state legislature could prevent the Government from asserting its right of action in the federal courts. *United States* v. *Allegheny County, loc. cit. supra,* and cases cited. And while in determining "the applicable federal rule," this Court has "occasionally selected state law" (*Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 367), such a course, here as there, "would subject the rights * * * of the United States, to exceptional uncertainty", whereas "the desirability of a uniform rule is plain" (*ibid.*).*

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JUNE 1946.

* The court below stated (R. 42) that counsel for the Government in substance conceded that state law was controlling. In order to remove any misapprehension in that regard, the United States, in its motion for a rehearing, set forth at length its position that federal and not state law was controlling. The court below denied that motion without opinion (R. 49), thus indicating that it did not rest its opinion upon any supposed concession by counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1946